



National Association of Waterfront Employers

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February 21, 2011

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570-0001

Re: *Specialty Healthcare and Rehabilitation Center of Mobile and United
Steelworkers, District 9, Petitioner.*
Case 15-RC-8773
December 22, 2010

Dear Members of the National Labor Relations Board:

The National Association of Waterfront Employers ("NAWE") objects to the process of making any broad-based policy change made through this adjudication. If the National Labor Relations Board ("Board") wants to establish a broad new policy on bargaining units applicable to more than the party involved in this individual case, the Board should publish that new rule as a proposed rule for public comment.

NAWE is the voice of the private sector U.S. marine terminal operator (MTO) and stevedoring industry in Washington, and its members are a critical part of the world maritime transportation system (MTS). NAWA members load and unload cargo in every major port in the U.S. and are the link between ocean, rail and motor carriers. The cargo that flows through U.S. ports is the lifeblood of the U.S. and world economy, creating jobs, lowering consumer costs and increasing the standard of living. NAWA member companies are all subject to multi-employer bargaining agreements.

NAWE submits that the process being utilized by the Board is statutorily and constitutionally flawed because it denies full participation in the process to individuals who will be subject to the final ruling. While the Board has requested "*amicus* briefs," this approach to policy-making clearly denies full participation in the process to entities that may be affected by this Board decision. This approach is defective for multiple reasons, including, but not limited to:

- (1) **NEW EVIDENCE**—Potentially impacted parties are not in a position to submit admissible evidence. *Amici* are limited to the evidence that has been submitted in the case by the parties. On the other hand, a formal rulemaking would allow every potentially affected party to submit any evidence that they felt was probative.



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- (2) **CROSS-EXAMINE**—Potentially impacted parties cannot cross-examine witnesses or otherwise challenge evidence that may be submitted by parties that are on the opposite side of the issue. Giving all interested parties party status, or pursuing an on-the-record rulemaking, would solve this problem.
- (3) **LIMITED LEGAL ARGUMENTS**—Potentially interested parties are limited to those legal arguments that are of interest to the Board, and cannot file motions that raise other legal issues that might be relevant. For example, an argument that the section of the statute in question is unconstitutionally vague or violates the delegation doctrine or otherwise runs afoul of the separation of powers can simply be ignored by the Board in this procedure if raised by an *amici*.
- (4) **LIMITED APPEAL RIGHTS**—Potentially interested parties would not have standing to appeal or otherwise seek judicial review of any decision reached by the Board in this case, even if the decision adversely impacts them.

For these reasons and many others, the process adopted by the Board to address this issue is fundamentally flawed and unfair. Once the Board recognizes that it may adopt a new policy that could impact multiple other employers and employees, due process dictates that the Board publish a proposal as a proposed rule for public comment.

Because this process is fundamentally unfair, NAWE requests that the Board stay the current proceedings and instead publish a formal rule following the procedures required by the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

Sincerely,

A handwritten signature in black ink, appearing to read "F. Edwin Froelich", written in a cursive style.

F. Edwin Froelich, MD, JD
General Counsel
National Association of Waterfront Employers